
Supreme Court Agrees to Hear Constitutional Challenge to PCAOB

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The United States Supreme Court agreed yesterday to consider a facial challenge to the constitutionality of the Public Company Accounting Oversight Board (PCAOB or Board), granting certiorari in *Free Enterprise Fund and Beckstead and Watts, LLP v. Public Company Accounting Oversight Board, et al.* The U.S. Court of Appeal for the D.C. Circuit had rejected this challenge in a 2-1 opinion and then denied rehearing en banc by a 5-4 margin.

The PCAOB, which was created in the Sarbanes-Oxley Act of 2002, exists to register public accounting firms, establish auditing and ethics standards, conduct inspections and investigations of registered firms, and impose sanctions as needed. The challenge was brought by an accounting firm subject to PCAOB regulation and an organization whose members are subject to PCAOB regulation (the Petitioners). The United States intervened on behalf of the PCAOB to defend the Board's constitutionality (the Respondents).

The cert petition presented, and the Supreme Court agreed to consider, three arguments as to why the PCAOB is unconstitutional. First, and most prominently, the Petitioners will argue that the PCAOB violates the constitutional requirements of separation of powers because the Board's members are impermissibly insulated from Presidential oversight. The PCAOB's members are appointed by the SEC Commissioners, not the President, and are also removable only by the SEC, and even then, only for good cause. This renders Presidential control attenuated because the SEC Commissioners themselves are also removable only for good cause. According to the Petitioners, this structure is problematic because under Article II of the Constitution, the entirety of the executive power is vested in the President, and the two-degrees of separation between the President and the PCAOB makes it impossible for him to exercise any meaningful control over the Board. While the Supreme Court has held that it is constitutionally permissible to have independent agencies whose heads cannot be removed at will by the President, no case has previously raised the question of whether two layers of insulation is permissible. The D.C. Circuit rejected this argument, agreeing with the Respondents that the PCAOB is so wholly subordinated to the SEC that the PCAOB is effectively no more independent than the SEC itself.

The Petitioners will also present two arguments as to why the PCAOB runs afoul of the

Constitution's Appointments Clause, which provides that Heads of Departments may appoint "inferior officers," but that principal officers must be appointed by the President. One argument is that the PCAOB members are so independent that they qualify as principal officers. As such, it is unconstitutional to have them appointed by the SEC Commissioners rather than by the President. The D.C. Circuit rejected this argument on the grounds that the PCAOB is subordinated to the SEC, making its members mere inferior officers.

Second, the Petitioners will argue that appointment by the SEC Commissioners does not qualify as appointment by a Head of a Department. This is true for two reasons. First, the Petitioners read a 1991 Supreme Court decision as suggesting that an independent agency like the SEC, which is not itself wholly subordinated to the President, does not qualify as a Department. Second, they read the same case as suggesting that a Department Head must be a single individual, and that the PCAOB is flawed in that its members are appointed by the SEC Commissioners collectively, rather than exclusively by the Commission's Chairman.

Absent any extensions, the Petitioners' briefs will be due on July 2, 2009, and amicus briefs supporting the challenge due on July 9. The Respondents' briefs are scheduled to be due on August 3, with amicus briefs supporting the constitutionality of the Board and those in support of neither party due on August 10.

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